New Developments in Search and Seizure: More Than Just a Matter of Semantics

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Introduction

Law is experience developed by reason and applied continually to further experience.[1]

Fourth Amendment[2] law has changed dramatically over the last several years. The change has been subtle because there have been only a handful of significant cases each year. The dramatic but gradual evolution of search and seizure jurisprudence over this period has not followed any logical pattern, particularly in recent cases decided by the Supreme Court. In addition, the results of a variety of cases were unexpected. In just this past year, the final outcome of several cases defied most predictions from scholars and practitioners.[3]

This article addresses these and other recent decisions from the Supreme Court and the Court of Appeals for the Armed Forces (CAAF), covering a wide range of Fourth Amendment issues. The outcomes in the cases do not represent any common theme or trend. In several cases, however, the final result came down to an interpretation of just one word or phrase.[4] In the practice of law, the meaning of a single word routinely makes a significant difference. In the words of Felix Frankfurter, former Associate Justice of the Supreme Court, "All our work, our whole life is a matter of semantics, because words are the tools with which we work, the material out of which laws are made, of which the Constitution was written. Everything depends on our understanding of them."[5]

Terrorism Legislation

The terrorist attacks on 11 September 2001 generated significant changes in legislation. Foremost among these legislative changes was the USA PATRIOT Act,[6] signed into law by the President on 26 October 2001. The coverage of the Act is extensive. Generally, it broadens the power of federal law enforcement and intelligence officers to track Internet communications; to intercept the content of oral, wire, and electronic communications; and to provide more disclosure to other agencies.[7] From a force protection standpoint, the Act enhances the ability of commanders in all services to maintain operational and installation security. Although the full impact of the Act has yet to be seen, legal advisers at major commands and installations need to be familiar with the Act and aware of its implications.[8]

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1. Roscoe Pound, *quoted in* CHRISTIAN SCI. MONITOR, Apr. 24, 1963, *reprinted in* JAMES B. SIMPSON'S CONTEMPORARY QUOTATIONS (1988), *available at* http://www.lexis.com (all sources/references/collected quotations).

2. U.S. CONST. amend. IV.

3. Most notable of these cases are *Kyllo v. United States*, 533 U.S. 27 (2001), discussed *infra* notes 31-56 and accompanying text, and *United States v. Green*, 55 M.J. 76 (2001), discussed in last month's *The Army Lawyer* in Lieutenant Colonel Michael R. Stahlman's article, *New Developments on the Urinalysis Front: A Green Light in Naked Urinalysis Prosecutions?*, ARMY LAW., Apr. 2002, at 14.

4. *See* Saucier v. Katz, 533 U.S. 194 (2001) (finding lower court's fusion of two distinct inquiries involving qualified immunity analysis was error despite nearly identical wording of each inquiry). Although the main text of this article does not discuss *Saucier v. Katz*, military practitioners should still be aware of the case. In short, it involves the "use of force" by military police on a military installation during a celebration at the Presidio in San Francisco. *Id.* at 197-98. The case has implications for military practitioners advising military police and other law enforcement officials on arrests, reasonable use of force, and the extent of qualified immunity. *See also* United States v. Carter, 54 M.J. 414 (2001) (holding that "substantial basis" has different meanings in the context of reviewing probable cause determinations and application of the good faith exception to the exclusionary rule), discussed *infra* notes 109-26 and accompanying text.

5. Felix Frankfurter, *quoted in* READER'S DIGEST, June 1964 (responding to a counsel's comment that a challenge from the bench was "just a matter of semantics"), *reprinted in* SIMPSON, *supra* note 1.

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

7. *See id.* For a comprehensive review of the changes, see Charles Doyle, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, Congressional Research Service (CRS) Report for Congress, the Library of Congress (Dec. 10, 2001), *available at* http://www.fpc.gov/CRS_REPS/tssa1210.pdf.

8. Section 104 of the Act is one example of its significant impact on the military. It provides a statutory exception to the Posse Comitatus Act, 18 U.S.C.S. § 1385 (LEXIS 2002), allowing the armed forces to assist in emergencies involving "other" weapons of mass destruction (previously the exception was just for emergencies involving biological, chemical, or nuclear weapons). *See* USA PATRIOT Act of 2001, § 104.

Computers

Private use of government computers is one area of Fourth Amendment law that makes most judge advocates very uneasy. Do service members have a reasonable expectation of privacy when they use government computers for private communications or personal matters?[9] What are the limits, if any, for government agents monitoring service members' use of government computers? Unfortunately, few military cases have addressed these questions. Even worse for military practitioners, the knowledge base in this area of the law is limited, and service regulations provide little clarification.[10]

In a recent article, Lieutenant Commander Rebecca A. Conrad, U.S. Navy, shed considerable light on this subject.[11] Specifically, she addressed recent CAAF opinions dealing with use of government computers in the context of the Fourth Amendment, along with applicable statutes and service regulations. Her article is a "must-read" for military practitioners. She ultimately concludes that service members only have, at best, a limited expectation of privacy in their private use of government computers.[12] More importantly, she provided practitioners with an excellent resource to answer most computer-related questions that raise Fourth Amendment concerns. She also made several recommendations on how the government should proceed when monitoring service members' use of government computers.[13]

United States v. Gallo

United States v. Gallo[14] was the only reported case this past year from any military appellate court which addressed a computer-related search under the Fourth Amendment.[15] Airman First Class Gallo was convicted of dereliction of duty and violating several federal child pornography statutes. He was sentenced to forty-two months' confinement, a dishonorable discharge, total forfeitures, and reduction to E-1. The Air Force Court of Criminal Appeals (AFCCA) set aside one specification involving possession of child pornography and affirmed the remaining findings.[16]

The CAAF granted review to consider whether the Fourth Amendment was violated when special agents executed a warrant to search Gallo's off-post quarters based solely on an affidavit from a U.S. Customs agent. Before executing the warrant, Gallo's supervisor had examined Gallo's workstation and computer because Gallo's work performance had declined. The supervisor observed some sexually explicit images on Gallo's computer, which led to Gallo's supervisor issuing him a letter of reprimand for his misuse of government property. Several months later, an Internet service provider (ISP) informed an Air Force computer security monitor that someone was trading child pornography on a government computer. The monitor traced this lead to Gallo's workstation. The security monitor then provided this information to special agents from the Office of Special Investigations (OSI), and they obtained a search authorization to make a copy of Gallo's (government) hard drive.[17]

Based on 262 images of child pornography found on Gallo's government hard drive, and because, according to Gallo's supervisor, Gallo had a personal computer at his home, the OSI agents contacted a U.S. Customs agent for assistance in getting a search warrant for Gallo's off-post quarters.[18] Ultimately, a federal magistrate issued a warrant to search Gallo's home and

9. This assumes that the service member is using the government computer in accordance with the *Joint Ethics Regulation*. *See generally* U.S. DEP'T OF DEFENSE, DIR. 5500.7R, JOINT ETHICS REGULATION (C3, 12 Dec. 1997).

10. A major reason for much of the confusion in this area stems from Military Rule of Evidence (MRE) 314(d). Military Rule of Evidence 314(d) states in part that "[g]overnment property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314(d) (2000) [hereinafter MCM]. Arguably, a service member could have a reasonable expectation of privacy when using a government issued computer for private use, depending on the circumstances of the use.

11. *See* Lieutenant Commander Rebecca A. Conrad, *Searching for Privacy in All the Wrong Places: Using Government Computers to Surf Online*, 48 NAVAL L. REV. 1 (2001), *available at* http://www.jag.navy.mil/html/njs.htm.

12. *Id.* at 4.

13. *See id.* at 52-54 (recommending more training to recognize when computer monitoring is authorized, thorough screening of systems administrators, and limiting content monitoring of e-mail communications).

14. 55 M.J. 418 (2001).

15. One service court opinion was published after the author submitted this article for publication. *See* United States v. Greene, 56 M.J. 817 (N-M. Ct. Crim. App. 2002) (interlocutory appeal) (reversing military judge's ruling to suppress evidence obtained following the consensual search and seizure of the accused's personal computer and computer disks).

16. *Gallo*, 55 M.J. at 419. The AFCCA also reassessed the appropriateness of the sentence, but nevertheless affirmed the entire sentence approved by the convening authority. *See* United States v. Gallo, 53 M.J. 556, 569 (A.F. Ct. Crim. App. 2000).

17. *Gallo*, 55 M.J. at 419. The court did not discuss the appropriateness of the search authorization and subsequent copying of the hard drive. Because the computer and hard drive were government issued, a strong argument exists that the search authorization was unnecessary based on MRE 314(d). *See* MCM, *supra* note 10, MIL. R. EVID. 314(d). Unfortunately, the opinion does not provide any facts about the extent of Gallo's authorization to use the computer for personal matters.

personal computer based entirely on the customs agent's affidavit. The affidavit included the fact that Gallo had a personal computer at his residence and included facts related to the child pornography discovered on his government-issued hard drive.[19] The remaining information in the affidavit, however, consisted primarily of the customs agent's general conclusions about pedophiles.[20]

The CAAF examined these facts to decide whether the federal magistrate's probable cause determination was proper. Specifically, the court addressed the issue of "whether there was a 'substantial basis' upon which the federal magistrate judge could have found probable cause to believe a search of appellant's residence would uncover child pornography."[21] The analysis required the court to look at the nexus between the information in the affidavit and the probability that the child pornography would be found in Gallo's home.[22] The magistrate's consideration of Gallo's incriminating statement to his supervisor complicated the nexus analysis because Gallo's supervisor had not informed Gallo of his rights under Article 31, UCMJ. The court assumed that use of this incriminating statement was improper and looked at the remaining facts to see if they were sufficient to support the magistrate's probable cause determination.[23]

Ultimately, the CAAF found that the nexus requirement was satisfied and that probable cause supported execution of the warrant. In terms of nexus, the court gave considerable weight to the customs agent's lengthy experience in law enforcement and child pornography investigations. The court also considered the pictures found on Gallo's government computer; that he fit the definition of a pedophile; and that he had traded, uploaded, and downloaded child pornography on his government computer. The court found that "[b]ased on these factors, it is reasonably probable that appellant would keep and work on this material [at his home]."[24]

The court also concluded that even if probable cause was lacking due to an insufficient nexus between the information and Gallo's home, the good faith exception to the exclusionary rule would apply.[25] A major factor that supported the good faith exception was that the customs agent's affidavit was much more than a bare-bones statement. The customs agent provided the reasons for his conclusions and the extent of his experience in law enforcement. Furthermore, the customs agent supported his affidavit with information from the OSI agents who had retrieved a copy of the child pornography stored on Gallo's government hard drive.

Judge Gierke and Judge Effron disagreed with the majority. They concluded that the federal magistrate did not have a "substantial basis" for his probable cause determination and that the good faith exception did not apply because the affidavit was merely conclusory.[26] They viewed the customs agent's experience differently. Based on his experience, they believed the agent should have provided the magistrate with concrete evidence, instead of mainly conclusions. In support, they noted that the majority went against its own previous advice that officials making probable cause determinations need to be provided with the images of child pornography.[27] No images were provided to the federal magistrate in *Gallo.*[28]

Gallo has many valuable lessons for military practitioners. Foremost, judge advocates need to provide their supported commands with regular training on basic legal concepts, such as when and how to give Article 31 rights. In addition, even

18. *Id*. at 420. Gallo's supervisor got this information from Gallo after OSI agents had asked Gallo's supervisor if Gallo had a computer at home. Gallo's supervisor did not advise Gallo of his rights under UCMJ article 31. The agents did not ask Gallo's supervisor for this information. *Gallo*, 53 M.J. at 559.

19. *Gallo*, 55 M.J. at 421.

20. *Id.* at 420.

21. *Id.* at 422 (citing United States v. Carter, 54 M.J. 414, 421 (2001)). The issue of "substantial basis" in *Carter* is discussed *infra* notes 119-26 and accompanying text.

22. *Gallo*, 55 M.J. at 421 (citing MCM, *supra* note 10, MIL. R. EVID. 315(f)(2)). The court also addressed whether the information provided to the magistrate was stale. The court determined that the information was not stale because most of it was less than a month old. *Id*. at 422. The opinion does not provide the actual dates relied on by the court, but the AFCCA opinion provides dates which enable evaluation of the timeliness of the information. *See Gallo*, 53 M.J. at 559. The CAAF did point to several federal circuit cases, which permitted the use of information more than six-months old to seize pornography on computer hard drives. *Gallo*, 55 M.J. at 422 (citing United States v. Hay, 231 F.3d 630 (9th Cir. 2000) (six months); United States v. Lacy, 119 F.3d 742 (9th Cir. 1997) (ten months)).

23. *Gallo*, 55 M.J. at 421.

24. *Id.* at 422.

25. *Id.* (citing United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)).

26. *Id*. at 423-24 (Gierke, J., joined by Effron, J., dissenting).

27. *Id*; *see* United States v. Monroe, 52 M.J. 326, 332 (2000) (advising that it would have been preferable to provide commander making probable cause determination with actual images of child pornography or a detailed description of the images).

28. *Gallo*, 55 M.J. at 424.

though it did not occur in *Gallo*, criminal investigators should not use military personnel with little or no law enforcement training to gather information the investigators otherwise cannot obtain. Although the actions of Gallo's supervisor did not nullify an otherwise lawful search authorization, the better practice would have been to avoid asking Gallo to provide incriminating information without a proper rights advisement.

The second lesson for practitioners relates to when they should get a search authorization to obtain information on a government computer. Although the CAAF did not address whether OSI needed an authorization to search Gallo's government computer, the court's silence seems to be tacit approval of the OSI's decision. Even if the court did not intend this implication, practitioners would be wise to follow the actions of the OSI investigators in *Gallo* by getting a search authorization when in doubt. Although a strong argument exists that service members do not have a reasonable expectation of privacy in their government-issued computers, this area of Fourth Amendment law in the military is still uncharted.

The next important lesson from *Gallo* is drawn from the dissent. Although the majority found no abuse of discretion by the military judge in denying the defense suppression motion, the federal magistrate should have been provided with images from Gallo's hard drive or a detailed description of the images. The magistrate relied entirely upon the conclusions in the affidavit that the images were child pornography and therefore illegal. When the sufficiency of evidence to establish probable cause is borderline, providing a magistrate or commander with actual images may make the difference. As the CAAF previously advised in *United States v. Monroe*,[29] the better practice is to provide officials making probable cause determinations with actual images instead of just assertions or conclusions.[30]

The final lesson from *Gallo* is that practitioners need to locate their child pornography experts and talk to them well before a child pornography case raises its ugly head. Aside from the problems with properly charging child pornography violations, child pornography cases have many other pitfalls. As in *Gallo*, most child pornography cases involve computers. Invariably, these cases seem to have significant Fourth Amendment questions. Most experts in child pornography investigations have the training and experience in proper search and seizure methods to assist practitioners with navigating these dangerous waters. *Gallo* is a good example of when the experience of a child pornography expert buoyed an otherwise bare bones affidavit.

Reasonable Expectations of Privacy: Using New Technology

Kyllo v. United States

When law enforcement officials use new technology to enhance their ability to fight crime, the Fourth Amendment always gets mixed up in the fray. The best example of this is the case that established the foundation for modern search and seizure jurisprudence, *Katz v. United States*.[31] In *Katz*, the Supreme Court signaled the beginning of the end to its long line of precedent that looked at the Fourth Amendment landscape through the lens of "trespass" doctrine, protecting against physical invasions of property as opposed to the privacy interests of people.[32] Government agents in *Katz* used a wireless listening and recording device that they placed on a public telephone booth. The Court concluded, to the surprise of many, that the government's use of the eavesdropping device violated Katz's privacy rights under the Fourth Amendment.[33] As in *Katz*, the Supreme Court broke new ground in Fourth Amendment law with its decision in *Kyllo v. United States*.[34]

Kyllo confronted the Court with whether law enforcement use of a thermal imaging device to look at the outside of a private home was a "search." Kyllo was suspected of growing marijuana in his home. Agents for the U.S. Department of the Interior obtained a thermal imager and scanned Kyllo's home for excessive infrared radiation.[35] Normally, marijuana plants require high-intensity lamps to grow indoors. These lamps emit considerable amounts of infrared radiation, which in most cases, a thermal imaging device can detect. The agents scanned Kyllo's home and determined that the "roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes."[36] Armed with this information, tips from informants, and Kyllo's high utility bills, the agents obtained a search warrant from a federal magistrate judge. The subsequent search

29. 52 M.J. at 326.

30. *See id.* at 332; *see also* Major Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, ARMY LAW., May 2000, at 17 (discussing *United States v. Monroe*, 50 M.J. 550 (A.F. Ct. Crim. App. 1999), in light of the AFCCA's caution that the case was "borderline" and that the better practice would be to provide actual images of child pornography).

31. 389 U.S. 347 (1967).

32. *Id.* at 351-53.

33. *Id.* at 350-53.

34. 533 U.S. 27 (2001).

35. *Id.* at 29.

revealed Kyllo was growing over 100 marijuana plants in his basement.[37]

Kyllo unsuccessfully moved at trial to exclude evidence obtained under the warrant, claiming that the use of the thermal imaging device was improper.[38] After several trips between the U.S. District Court for the District of Oregon and the Court of Appeals for the Ninth Circuit, the case was affirmed.[39] The Ninth Circuit found that Kyllo did not have a subjective expectation of privacy because he did not conceal the heat that was being emitted.[40] The Supreme Court disagreed with the Ninth Circuit, holding that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[41]

The Court's analysis began with a discussion of what constitutes a "search" under the Fourth Amendment. The focus of the analysis was whether the scan of Kyllo's home was like an external visual inspection or more intrusive. The Court's concern was that as technology has improved, the potential for government intrusion into the private lives of individuals has increased without any proportionate increase in protection under the law.[42] As technology has improved, so has the risk of eroding bedrock protections under the Fourth Amendment. To limit this erosion, at least in terms of privacy in the sanctity of a home, the Court decided to draw a bright line.[43]

The Court drew the bright line at the entrance to Kyllo's home.[44] Although the agents used a passive device that did not physically intrude into the home, they gathered information they otherwise could not have obtained unless they had entered Kyllo's home. The Court reversed the Ninth Circuit and remanded the case to "determine whether, without the evidence [provided by the device], the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced."[45]

Four Justices joined in dissent. Their concern was that the majority's bright line was too broad and simply not supported by the facts. In the dissent's view, the majority opinion is "not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building."[46] Much of the dissent focuses on distinguishing "through-the-wall" versus "off-the-wall" surveillance. The former "gives the observer or listener direct access to information in a private area, [while off-the-wall surveillance provides only] the thought processes used to draw inferences from information in the public domain."[47]

Surveillance of the outside of Kyllo's home provided information that was open to the public, raising the inference that Kyllo was using high-intensity lamps to grow marijuana as the agents suspected. The agents did not "physically" intrude into Kyllo's home. The dissent, like the majority, would draw a bright line at Kyllo's front door, but only when sense-enhancing technology "provides the functional equivalent of actual presence in the area being searched."[48] The broad reach of the majority's rule raises the danger of potentially prohibiting sense-enhancing methods that the Court has already approved, such as dogs trained to sniff out drugs, explosives, or other contraband. The dissent points to clearly established precedent from the Court that "a dog sniff that 'discloses only the presence or absence of narcotics' does 'not constitute a search within the meaning of the Fourth Amendment,' and it must fol-

36. *Id.* at 30.

37. *Id.*

38. *Id.*

39. *Id.* at 30-31.

40. *Id.* at 31.

41. *Id.* at 40.

42. *Id.* at 34.

43. *Id.* at 40.

44. *Id.* In stark contrast to its expressed concern in *Kyllo* to protect the sanctity of a home, the Court nevertheless approved the search of a home in another case this year that was conducted without a warrant or probable cause. In *United States v. Knights*, 122 S. Ct. 587 (2001), the Court held "that the warrantless search of [Knight's home] supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* at 593.

45. *Kyllo*, 533 U.S. at 40.

46. *Id.* at. 43-44 (Stevens, J., joined by Rehnquist, C.J., O'Connor and Kennedy, JJ., dissenting).

47. *Id.* at 41.

48. *Id.* at 47.

low that sense-enhancing equipment that identifies nothing but illegal activity is not a search either."[49]

Finally, the dissent criticizes the majority's limitation of its rule to technology not generally available to the public. "[T]he contours of [the Court's] new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is 'in general public use.'"[50] How much use by the general public is enough? The majority avoided answering this question by merely brushing off the dissent's legitimate concern in a footnote, saying "[t]hat quarrel . . . is not with us but with this Court's precedent," and "[g]iven that we can quite confidently say that thermal imaging is not 'routine,' we decline in this case to reexamine that factor."[51]

Kyllo has several important implications for the military. First, *Kyllo* clearly signals an end to the use of thermal imagers and similar devices by law enforcement officials during surveillance of private homes without a warrant or search authorization. Fortunately, not many service members or civilian personnel have marijuana plantations like Kyllo's in government housing. Legal advisers still need to remain alert, however, for military police or military criminal investigators using any sense-enhancing technology for surveillance in base housing areas and other locations that have greater expectations of privacy. At the very least, staff judge advocates and trial counsel should include *Kyllo* in their training with supported commands and law enforcement detachments. In addition, to ensure compliance with the *Kyllo* majority's bright-line rule, government counsel need to find out what technology law enforcement officials use on and off the installation.

Another important implication of *Kyllo* relates to the dissent's concerns. The case was decided on 11 June 2001, well before the tragic events of 11 September. What if law enforcement officials suspect that someone possesses a dangerous virus, bacteria, or even worse, a nuclear weapon in a home or residential area?[52] A suspicion is not enough to establish the probable cause necessary to obtain a search warrant. Under these circumstances, can law enforcement use sense-enhancing technology that merely detects the presence of dangerous emissions outside the home or residential area? The answer is "no" based on *Kyllo*; they must have a warrant supported by probable cause.[53]

The problem now is that the Court has drawn a bright (and broad) line supported by the Constitution. Any attempt to narrow the scope of *Kyollo* may tread on fundamental Fourth Amendment rights, at least in terms of the majority's interpretation. As the dissent suggests, "It would [have been] far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints."[54] To the extent that legislators will or can narrow the scope of *Kyllo*, in the wake of September 11, the significant threat posed by terrorist activities and their means or weapons of mass destruction warrant at least some response.

The final and most important impact of *Kyllo* concerns what the decision does not address. Because the bright line was drawn at the entrance of Kyllo's home, it ended at his back door. The majority was compelled to reach its decision because the case involved the privacy of a home, which is "'[a]t the very core' of the Fourth Amendment."[55] What impact does *Kyllo* have on law enforcement activity outside a home? The answer depends on the area and specific target of the surveillance. If police are looking for an escaped prisoner or a crime suspect fleeing apprehension at night in a public area, *Kyllo* does not limit police from using a thermal imaging device or any other similar visual aid. On the other hand, *Kyllo* may extend beyond the home in areas with similar expectations of privacy. The lesson for practitioners, however, is to review *Kyllo's* concerns when advising law enforcement officials who contemplate using new or even existing technology for surveillance or other law enforcement purposes.[56]

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49. *Id*. at 47-48 (citing United States v. Place, 462 U.S. 696, 707 (1983)). The problem with this argument is that Kyllo's home was the target of the surveillance, not his suitcase in an airport or other public area as were the circumstances in *Place*.

50. *Id*. at 47.

51. *Id*. at 39 n.6.

52. *See id*. at 48.

53. Obviously, lethal types of bacteria and viruses along with nuclear material pose considerable public safety and national security concerns that would raise several exceptions to the probable cause and warrant requirements. *See, e.g*., Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (discussing situations where a roadblock would be permissible, the Court stated that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an *imminent terrorist attack* or to catch a dangerous criminal who is likely to flee by way of a particular route" (emphasis added)). *See also* MCM, *supra* note 10, MIL. R. EVID. 314(i) (permitting warrantless searches without probable cause in emergency circumstances to save lives or related purposes), 315(g) (allowing warrantless searches based on probable cause during certain exigent circumstances).

54. *Id*. at 51.

55. *Id*. at 31 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

56. For an excellent article on the practical implications of *Kyllo*, readers are encouraged to review Thomas D. Colbridge, Kyllo v. United States*: Technology Versus Individual Privacy*, 70 F.B.I. L. ENFORCEMENT BULL. 10 (2001), *available at* http://www.fbi.gov/publications/leb/2001/october2001/oct01p25.htm.

Fourth Amendment Exceptions: Vehicle Stops[57]

This past year the Supreme Court decided three cases involving vehicle stops.[58] These cases are important for military practitioners because military courts have published very few decisions on this subject. One area particularly devoid of military precedent involves brief investigatory stops of motor vehicles based on reasonable suspicion. As noted recently by the Air Force Court of Criminal Appeals (AFCCA) in *United States v. Robinson*,[59] "there is little military case law on this matter."[60] The cases discussed in this section help fill the void caused by a lack of similar cases in the military. In addition, they provide practitioners with an excellent perspective on the Supreme Court's present view of the law involving vehicle stops.

Probable Cause and Warrantless Arrests: Arkansas v. Sullivan

In the per curiam opinion of *Arkansas v. Sullivan*,[61] the Supreme Court reaffirmed its decision in *United States v. Whren*[62] that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[63] A police officer stopped Sullivan for speeding and having an improperly tinted windshield.[64] When viewing Sullivan's drivers license, the officer recognized Sullivan as a suspect in an ongoing narcotics investigation. After Sullivan opened his door while looking for his vehicle registration, the officer noticed a rusted hatchet on the floorboard of Sullivan's car. The officer arrested Sullivan and put him in a squad car. During an inventory search of Sullivan's car, the officer found a bag containing methamphetamine and various items of drug paraphernalia. Sullivan was charged with a variety of offenses stemming from the initial stop and evidence subsequently found in his car.[65]

At trial, Sullivan moved to suppress this evidence, claiming that the search conducted by the officer was just a sham or pretext. The trial court granted Sullivan's motion to suppress. The Arkansas Supreme Court affirmed the trial court's decision and denied the State's request for a rehearing.[66] The Arkansas Supreme Court declined to follow *Whren* because it believed much of that opinion was dicta. The Arkansas Supreme Court agreed with the trial judge that "'the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime,' and observed that 'we do not believe that *Whren* disallows' suppression on such a basis."[67]

The Supreme Court strongly disagreed with the Arkansas Supreme Court's decision to disregard *Whren*. Although *Whren* involved a search following a traffic stop instead of a search following a custodial arrest, it still controlled the analysis in *Sullivan*. Moreover, the Supreme Court found that the lower court concluded incorrectly that it could provide greater protection than Supreme Court precedent involving constitutional rights. The Court reiterated its precedent that while

> "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[68]

57. "Vehicle stops" in the context of the Fourth Amendment encompass a wide variety of search and seizure topics. The term is used here to generally orient the reader to warrant and probable cause exceptions, or both, under the Fourth Amendment, and more specifically to cases involving motor vehicles.

58. The first two cases discussed herein concern "stops" based on probable cause under the motor vehicle exception to the warrant requirement. The last case discussed in this section, *United States v. Arvizu*, 122 S. Ct. 744 (2002), involves a brief "*Terry* stop" of a vehicle based on less than probable cause (that is, a reasonable suspicion). *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

59. 56 M.J. 541 (A.F. Ct. Crim. App. 2001).

60. *Id.* at 544.

61. 532 U.S. 769 (2001).

62. 517 U.S. 806 (1996).

63. *Sullivan*, 532 U.S. at 772 (citing *Whren*, 517 U.S. at 813).

64. *Id.* at 769.

65. *Id.* at 770.

66. *Id.*

67. *Id.* at 771 (quoting Arkansas v. Sullivan, 11 S.W.3d 526, 552 (2000)). In addition, the Arkansas Supreme Court said that, "even if it were to conclude that *Whren* precludes inquiry into an arresting officer's subjective motivation, 'there is nothing that prevents this court from interpreting the U.S. Constitution more broadly that the United States Supreme Court, which has the effect of providing more rights.'" *Id.* (quoting *Sullivan*, 11 S.W.3d at 552).

68. *Id.* at 772 (quoting Oregon v. Hass, 420 U.S. 714, 719 (1975) (citations omitted)).

Justice Ginsburg, concurring in *Sullivan*, agreed that the majority opinion was in accord with precedent. She noted the Arkansas Supreme Court's concern that "[v]alidating [the officer's] arrest would accord police officers disturbing discretion to intrude on individuals' liberty and privacy;"[69] however, she concurred because "this Court has held that such exercises of official discretion are unlimited by the Fourth Amendment."[70] She also requested that the Court reconsider its decision in *Atwater v. Lago Vista*,[71] discussed below.[72]

Atwater v. Lago Vista

In *Atwater*, the Supreme Court answered the long-standing question of whether police can make an arrest for minor offenses.[73] The Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[74]

Ms. Atwater was driving with her two adolescent children in Lago Vista, Texas.[75] Neither she nor her children were wearing seatbelts, a violation of Texas law.[76] A Lago Vista police officer observed the seatbelt violation and stopped Ms. Atwater. The officer had previously given her a warning for a similar offense. As the officer approached Ms. Atwater, he allegedly yelled that she was going to jail and directed her to provide him with her driver's license and proof of insurance, both of which she did not have. He called for backup to make an arrest and had Ms. Atwater give her distraught children to a friend who lived nearby. The officer placed Ms. Atwater under arrest, handcuffed her, and drove her to the police station, where she had her mug shot taken and was jailed for an hour before being released on bond. She later pled no contest to misdemeanor seatbelt charges and paid a fifty-dollar fine.[77]

Ms. Atwater filed a suit under 42 U.S.C. § 1983 against the officer and others for her arrest and subsequent treatment, claiming a violation of her right to be free from unreasonable seizure under the Fourth Amendment.[78] The Supreme Court ultimately concluded that, although her arrest was "humiliating," it was "not so extraordinary as to violate the Fourth Amendment."[79] The Court determined that the arrest was reasonable, in large part because the Texas statute in question authorized police officers to make arrests without a warrant for minor traffic violations.[80] The majority noted that all fifty states and the District of Columbia have similar statutes.[81]

Although *Atwater* was a slim (five to four) majority opinion, it nevertheless answered an important and nagging question in Fourth Amendment law. In doing so, the Court disregarded Ms. Atwater's argument "for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."[82] The Court's problem with her argument was that it "would not only place police in an almost impossible spot, but would guarantee increased litigation over many of the arrests that would occur," and her "various distinctions between per-

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69. *Id.* at 772-73 (Ginsburg, J., joined by Stevens, O'Connor, & Breyer, JJ., concurring).

70. *Id.* at 773.

71. 532 U.S. 318 (2001).

72. *See Sullivan*, 532 U.S. at 773. Justice Ginsburg premised her request on whether *Atwater* results in "anything like an epidemic of unnecessary minor-offense arrests." *Id*. (citing *Atwater*, 532 U.S. at 353).

73. Previously, the Court had only intimated its belief that arrests for even minor criminal offenses were authorized, stating that "the standard of probable cause 'applie[s] to all arrests, without the need to balance the interests and circumstances involved in particular situation.'" *Atwater*, 532 U.S. at 354 (citing Dunaway v. New York, 442 U.S. 200, 208 (1979)).

74. *Id.*

75. *Id*. at 323.

76. *Id*. at 323-24. Under Texas law, a police officer has the authority to "'arrest without warrant a person found committing a violation' of these seatbelt laws, although it permits police to issue citations in lieu of arrest." *Id*. at 323 (quoting TEX. TRAN. CODE. ANN. §§ 543.001, 543.003-.005 (1999)).

77. *Id.* at 324.

78. *Id.* at 325.

79. *Id*. at 354-55.

80. *Id.* at 343.

81. *Id.* at 344. An appendix to the opinion summarizes all the statutes. *See id*. at 355-60.

82. *Id.* at 346.

missible and impermissible arrests for minor crimes strike us as 'very unsatisfactory line[s]' to require police officers to draw on a moment's notice."[83]

Justice O'Connor's spirited attack of the majority brings to light the significant implications of the opinion. She stated that "[j]ustifying a full arrest by the same quantum of evidence that justifies a traffic stop—even thought the offender cannot ultimately be imprisoned for her conduct—defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures."[84] She proposed a rule that

> would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.[85]

Finally, she warned that "[s]uch unbounded discretion [authorized by the majority opinion] carries with it grave potential for abuse," and that "[a]fter today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."[86]

Atwater is important for military practitioners because it clearly signals that officials acting in a law enforcement capacity have the authority to make a full arrest for even minor traffic violations consistent with applicable statutes. Flowing from that authority, the officers may then conduct a search incident to the arrest. In the military, the search incident to apprehension exception to the probable cause requirement of the Fourth Amendment is expressed in MRE 314(g).[87]

Reasonable Suspicion: United States v. Arvizu

From the standpoint of "new developments," the significance of *United States v. Arvizu*[88] lies more with its facts than on any new twists or changes in the law. For practitioners confronted with a question involving a motor vehicle stop based on reasonable suspicion, the law is well settled.[89] The problem, though, is that the facts vary dramatically among these "vehicle stop" cases. "[I]n many instances the factual 'mosaic' analyzed for a reasonable-suspicion determination would preclude one case from squarely controlling another."[90] Accordingly, practitioners need to go beyond one or even a few published cases to determine whether the facts in any single case amount to reasonable suspicion. *Arvizu* provides a good set of facts along with the Supreme Court's analysis on how those facts adequately raised a reasonable suspicion.

A U.S. Border Patrol agent stopped Arvizu in a remote part of southeastern Arizona.[91] A subsequent search of Arvizu's minivan revealed over 100 pounds of marijuana. Arvizu moved to suppress the evidence found in his minivan, claiming that the agent did not have a reasonable suspicion to make the stop.[92] The trial judge denied Arvizu's motion to suppress, but the Court of Appeals for the Ninth Circuit reversed this decision. The Supreme Court agreed with the trial judge, holding that "[t]aken together, [the factors supporting the agent's stop] sufficed to form a particularized and objective basis for [the agent to stop] the vehicle, making the stop reasonable within the meaning of the Fourth Amendment."[93]

In *Arvizu*, the Supreme Court reviewed numerous factors representing the "totality of the circumstances" to determine whether the agent's suspicion had an adequate basis. Initially, the agent was told that a vehicle had set off a sensor in a particular remote area, suggesting to him the driver might be trying to avoid a border checkpoint. The time of day suggested the same because drug smugglers were known to make their dash across the border from Mexico during the periodic shift changes of the agents. The agent was informed that a drug

83. *Id.* at 350 (quoting Carroll v. United States, 267 U.S. 132, 157 (1925)).

84. *Id.* at 364 (O'Connor, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

85. *Id.* at 366 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)).

86. *Id.* at 372.

87. *See* MCM, *supra* note 10, MIL. R. EVID. 314(g).

88. 122 S. Ct. 744 (2002).

89. When the basis for the stop is "reasonable suspicion" that criminal activity is afoot, the standard of review is whether "under the totality of the circumstances" the officer had a "'particularized and objective basis' for suspecting legal wrongdoing." *Id.* at 750 (citing United States v. Sokolow, 490 U.S. 1, 7 (1989); United States v. Cortez, 449 U.S. 411, 417-48 (1981)).

90. *Arvizu*, 122 S. Ct. at 751.

91. *Id.* at 747-48.

92. *Id.* at 750.

smuggler had set off the same sensor several weeks earlier using the same route as Arvizu's vehicle. The agent went to an area where he believed he would intercept the vehicle and waited.[94]

Arvizu's minivan soon approached, and it appeared to be similar to vehicles normally used by drug smugglers. The van slowed down considerably as it approached the agent's position on the road. As the van passed, the agent noticed five individuals inside. Although the agent was in plain view, Arvizu appeared stiff, and he did not look at the agent as he drove by. Based on the agent's experience, drivers normally look in the direction of border patrol agents and give them a friendly wave. The agent also noticed in the back of the van two children whose knees appeared to be higher than normal, as if something was underneath their feet. The agent pulled in behind the van, and the children began to periodically wave their hands mechanically and in unison while looking forward. Arvizu then signaled that he was turning, turned the signal off, and then back on again as he made an abrupt turn.[95]

The direction of the turn was significant for the agent because it was the last turnoff that would avoid the nearby border checkpoint. In addition, the unprepared roads in the area were normally used only by four-wheel drive vehicles. Finally, the agent checked the license number of the van. It was registered to an address just blocks away from the border in an area known to be used by drug smugglers. At this point the agent stopped Arvizu, asked him for permission to search his van, and Arvizu consented. The agent found over 100 pounds of marijuana in a bag under the children's feet.[96]

Criticizing the Ninth Circuit's approach to reviewing these factors in light of binding precedent, the Supreme Court said the lower court departed "sharply from the teachings of these cases," and its "view that it was necessary to 'clearly delimit' an officer's consideration of certain factors to reduce 'troubling . . . uncertainty,' also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field."[97] The Ninth Circuit's approach was to view each factor individually to determine its appropriateness. Finding many of the factors to be merely innocent conduct, the court determined the agent had an insufficient basis to make the stop. The Supreme Court agreed that many of the factors were innocent, but viewed under the totality of the circumstances together with reasonable inferences they raised based on the agent's training and experience, the factors amounted to a reasonable suspicion that Arvizu was engaged in illegal activity.[98]

Although *Arvizu* provides no "new developments," the decision is still important for practitioners because it is one more fact pattern from the Supreme Court to add to the overall body of law dealing with reasonable suspicion and vehicle stops. As discussed in the introduction to this section, no single case in this area of Fourth Amendment law will usually be enough to answer a question involving reasonable suspicion in a pending case; however, read in conjunction with other precedent, *Arvizu* will provide practitioners with answers in most cases. Moreover, *Arvizu* gives the field a good perspective on the Court's current interpretation of its own precedent. In the near future, *Arvizu* may determine the outcome in a recent Air Force vehicle stop case, *United States v. Robinson*.[99]

Roadblocks: Another Look at *Indianapolis v. Edmond*

In 2000, the Supreme Court decided *Indianapolis v. Edmond*,[100] discussed in last year's Military Justice Symposium, Volume II.[101] In *Edmond*, the Court found that the City of Indianapolis's checkpoint program for the interdiction of narcotics violated the Fourth Amendment because its primary purpose was "indistinguishable from the general interest in crime control."[102] The implications of *Edmond* for military

93. *Id.* at 753.

94. *Id.* at 748-49.

95. *Id.* at 749.

96. *Id.* at 749-50.

97. *Id.* at 751 (citations omitted).

98. *Id.* at 752.

99. 56 M.J. 541 (A.F. Ct. Crim. App. 2001), *petition for review granted*, No. 02-0148/AF, 2002 CAAF LEXIS 394 (Apr. 24, 2002).

100. 531 U.S. 32 (2000).

101. *See* Major Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, ARMY LAW., May 2001, at 20, 25-26. *Edmond* is discussed again this year because the author received a considerable number of inquiries from the field regarding the decision's practical implications in the military. Further discussion of the case will assist practitioners questioning the applicability of *Edmond* to military practice.

102. *Edmond*, 531 U.S. at 48. The primary purpose of the checkpoint program was unquestionable because a lighted sign cautioned motorists that they were approaching a "NARCOTICS CHECKPOINT ____ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." *Id*. at 35-36. Furthermore, the city conceded that its primary purpose was for the interdiction of illegal narcotics. *Id.* at 40.

commanders and their legal advisers go beyond just roadway checkpoints on an installation. In the military, commanders have broad discretion to conduct inspections for a wide range of purposes. Military Rule of Evidence 313(b) states, in part:

> An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle . . . . An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband . . . . Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.[103]

Despite this broad authority of commanders to conduct "inspections," *Edmond* needs to be considered when implementing or reviewing installation and unit policies. In other words, legal advisers need to ensure that the primary purpose for any "inspection" program at any unit level comports with *Edmond* in light of MRE 313(b). Labels that suggest that the primary purpose is for anything related to general crime control or drug interdiction must be avoided. Instead, descriptions or labels of inspection programs must include language provided in MRE 313(b). More importantly, judge advocates need to routinely advise their commanders, for example, that their urinalysis inspection programs are for unit readiness, military fitness, and good order and discipline, instead of tools to get rid of the "druggies."[104]

To many this may sound like "just a matter of semantics." Fortunately, *Edmond* dispels these critics. In the text of the opinion and in a footnote, the Court clearly signaled that certain administrative searches are not affected by its opinion. Sobriety and border checkpoints, searches at airports and government buildings, and by implication, military inspections, remain valid.[105] The distinguishing factor is that these intrusions serve an important government purpose that outweighs individual privacy interests. Furthermore, the Court avoided deciding whether a checkpoint with a proper primary purpose to check the sobriety of drivers, for example, will still be proper if it has a secondary purpose of drug interdiction.[106] Although this portion of the Court's discussion should not be read as a green light to use sobriety checkpoints as a subterfuge for drug interdiction, the Court's deliberate avoidance of this issue seems to suggest that it would be proper to have a valid sobriety checkpoint that has a secondary or collateral purpose of drug interdiction.[107]

Finally the Court cautioned that "the purpose inquiry . . . is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."[108] In other words, when a question involving the primary purpose of a checkpoint or inspection confronts military practitioners, the inquiry focuses on the commander's primary purpose and not on what the officials conducting the inspection believe is the primary purpose.

Exceptions to the Exclusionary Rule: Good Faith

United States v. Carter

Among the handful of Fourth Amendment cases decided by military appellate courts this past year, *United States v. Carter*[109] is the most important. In *Carte*r, the CAAF addressed whether probable cause supported a seizure authorization and, if not, whether the good faith exception to the exclusionary rule applied.[110] More importantly, the CAAF provided clear guidance concerning its interpretation of what constitutes a "substantial basis" for probable cause determinations as distinguished from application of the good faith exception under MRE 311(b)(3)(B).[111]

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103. MCM, *supra* note 10, MIL. R. EVID. 313(b).

104. *But see* United States v. Davis, 54 M.J. 690 (A.F. Ct. Crim. App. 2001), *petition for review denied*, 55 M.J. 238 (2001) (finding no abuse of discretion in military judge's ruling that results of urinalysis specimen were admissible despite Air Force Instruction that directed "urinalysis testing for illegal drug and narcotic use" for medical screening of pretrial detainees during inprocessing).

105. *Id*. at 47-48.

106. *Id*. at 47 n.2.

107. *See* United States v. Davis, 270 F.3d 977, 979-80 (D.C. Cir. 2001); *see also* United States v. Gudmundson, No. S29944, 2001 CCA LEXIS 349 (A.F. Ct. Crim. App. Dec. 6, 2001) (unpublished) (finding a proper primary purpose under MRE 313(b) for installation commander's urinalysis program even though he had knowledge of a rave party scheduled in the local community).

108. *Edmond*, 531 U.S. at 48.

109. 54 M.J. 414 (2001).

110. *Id*. at 418.

On the morning of 25 September 1996, Captain (CPT) Carter was the Battle Captain for his unit's tactical operations center in Kuwait.[112] The victim, First Lieutenant (1LT) CV, was asleep at around 0425 when she woke up and felt a watery substance on her face. At the same time she noticed an unidentified man over her with his knees pinning her upper body to the ground and his crotch toward her face. She got out of her sleeping cot and chased after the unidentified male, shouting for him to stop. Several unit guards joined in the chase of the unidentified male they described only as tall and black, wearing a battle dress uniform, no headgear, and no load bearing equipment.[113] Eventually, the unidentified male got away. At some point, 1LT CV wiped the watery substance she believed to be semen on her shirt and on the ground.[114]

Several other witnesses saw or heard the chase and provided information to Special Agent (SA) Hazell, U.S. Army Criminal Investigation Division (CID). No witnesses, including the victim, could identify CPT Carter as the assailant. Captain Carter denied committing the assault during several interviews with SA Hazell in Kuwait. At some point after 25 September, CPT Carter returned to his parent unit at Fort Hood, Texas. Special Agent Hazell's report of investigation was provided to SA Voos at Fort Hood. Eventually, SA Voos sought a search authorization to obtain a blood sample and other evidence from CPT Carter. Special Agent Voos presented an affidavit to a magistrate at Fort Hood which included the information provided to SA Voos by SA Hazell, a description of CPT Carter, a statement that semen stains were found on the victims shirt, and a general description of the units and field site in Kuwait. The magistrate, Lieutenant Colonel Hunter, concerned with the lack of detail in the affidavit, asked SA Voos additional questions and relied on his own knowledge and experience to approve the search authorization. The magistrate limited the authorization to the drawing of CPT Carter's blood.[115]

At his trial, CPT Carter moved to suppress the test results of his blood sample, claiming that the facts supporting the authorization did not amount to probable cause. The military judge denied the motion, but found that it was a "close call."[116] Captain Carter was convicted of various charges stemming from the assault on 1LT CV, and he was sentenced to a dismissal, five years' confinement, and total forfeitures.[117]

Noting the preference for warrants, particularly when there is a close call concerning probable cause, the CAAF avoided deciding whether the military judge abused his discretion in denying CPT Carter's motion to suppress. Instead, the court concluded that the search authorization was executed in good faith.[118] Although the court dodged resolving the probable cause issue, the opinion provides practitioners with an excellent overview of the law in this area. More importantly, however, the court identified a crucial distinction involving the "substantial basis" standard for probable cause determinations and "substantial basis" as it applies to the good faith exception under MRE 311(b)(3)(B).[119] In addition to identifying the distinction, the CAAF gave practitioners a clear roadmap as to how to apply "substantial basis" in both instances.

First, "substantial basis" as it applies to the review of a magistrate's probable-cause determination under *Illinois v. Gates*[120] "examines the information supporting the request for a search authorization through the eyes of a judge evaluating the magistrate's decision. In this context, the search authorization will be upheld if the judge determines that the issuing magistrate had a 'substantial basis' for determining the existence of probable cause."[121]

Second, "[w]hen the issue is whether the good faith exception should be invoked, MRE 311(b)(3)(B) uses 'substantial basis' to describe the absence of the first and third exceptions to good faith outlined in [*United States v. Leon*, 468 U.S. 897, 922 (1984)]."[122] In this context, "'substantial basis' as an element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization."[123] The rule "is satisfied if

111. *See id*. at 421-22.

112. *Id.* at 416.

113. *Id*. at 415.

114. *Id.* at 415-16.

115. *Id*. at 416-17.

116. *Id*. at 417. The military judge noted that SA Voos did not withhold any information, provided both inculpatory and exculpatory evidence, and did not try to explain any conflicts in the evidence. The military judge also found that the authorization was executed in good faith. *Id*.

117. *Id*. at 415.

118. *Id.* at 419.

119. *See id*. at 421-22. As noted by the court, "the phrase 'substantial basis' has different meanings, depending on the issue involved." *Id*. at 422.

120. 462 U.S. 213, 238 (1983).

121. *Carter*, 54 M.J. at 422.

the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause."[124]

Applying this analysis, the CAAF determined that, "even if [the magistrate] did not have a 'substantial basis' for determining the existence of probable cause, the military judge did not abuse his discretion by denying the motion to suppress, because all the elements of the good faith exception were satisfied."[125] As an aside, the court noted that this problem with the dual use of

> "substantial basis" underscores the risks inherent in codifying evolving constitutional issues. We suggest that the problem might be alleviated if the rules were written in more flexible language with respect to situations where the President did not intend to set forth specific military rules but, instead, intended to follow evolving civilian practice.[126]

Conclusion

The practice of law is more than just a matter of semantics, particularly in several Fourth Amendment cases decided over the past year covering a wide gamut of search and seizure issues. Whether deciphering the meaning of "substantial basis," divining what constitutes "reasonable suspicion," or splitting hairs when looking at what is "reasonable" under the Fourth Amendment, military practitioners must realize that even subtle differences in a legal standard or use of a phrase or word in a particular context may determine the outcome of a case.

Although the cases discussed in this article do not represent any clear trends, several opinions from the Supreme Court established new standards or bright-line rules that resolved significant and previously unanswered questions. In addition, the CAAF provided several opinions that brought considerable clarity to some cloudy principles involving rules of evidence and binding case authority. Through the experience of evolving Fourth Amendment jurisprudence this past year, military practitioners have gained a wide variety of new tools with which to work the machinery that constitutes the military justice system.

122. *Id*. at 419-20, 422.

123. *Id*. at 422.

124. *Id*.

125. *Id*.

126. *Id*. at 421 n.3.